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No. 10-418

IN THE

# Supreme Court of the United States

UNDER SEAL #10,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## REPLY BRIEF

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## REPLY BRIEF

It is difficult to imagine a case involving a more straightforward application of 18 U.S.C. § 3504. The district court found that Under Seal #10 made a "claim" that it was a "party aggrieved" under the statute. The Fourth Circuit did not upset these findings and the government has conceded them in its Opposition. Under Seal #10 also alleged that evidence obtained by the government was the primary product of an "unlawful act," *i.e.* former President Bush's warrantless wiretapping program. The government also concedes this point. These concessions make clear that the government, pursuant to Section 3504, should have admitted or denied whether it had conducted the illegal surveillance.

Because of its failure to do so, Under Seal #10 had "just cause" for its refusal to respond to the grand jury subpoena, and the district court's order holding it in contempt for doing so was an abuse of its discretion that should have been reversed.

Nevertheless, the government attempts to avoid the application of Section 3504 – and having to admit whether it unlawfully surveilled Under Seal #10 – by cobbling together the unfounded argument that Section 3504 relates only to Title III, and only required the government to admit or deny "surveillance in violation of Title III," and not "surveillance in violation of FISA" which it claims the alleged unlawful surveillance to have been. Brief for the United States in Opposition (hereinafter the "Gvt. Br.") at 6.

The government's argument cannot and does not withstand even the most cursory review.

First, it is premised on the faulty assertion that Section 3504 applies only to Title III. This clearly is not the case. Section 3504 is not part of Title III. It is a standalone statute that explicitly applies to any "unlawful act," *i.e.*, "the use of any electronic, mechanical, or other device (as defined in section 2510(5) of this title) ***in violation of the Constitution or laws of the United States*** or any regulation or standard promulgated pursuant thereto." 18 U.S.C. § 3504(b) (emphasis added.) Under Seal #10 asked the government, in correspondence and in its motion made pursuant to Section 3504, to disclose "any electronic surveillance," not just that conducted "pursuant" to Title III.[1]

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[1] The correspondence and motion are part of the Joint Appendix maintained with the Fourth Circuit under seal.

Under Seal #10 alleged that any warrantless surveillance conducted of it was an "unlawful act" because it violated ***both*** Title III and FISA. It violated Title III, for among other reasons, because prior to obtaining authorization to conduct the wiretap, the government failed to first obtain a warrant by demonstrating "probable cause for belief that an individual is committing, has committed, or is about to commit" one of the criminal offenses specified in the statute. 18 U.S.C. § 2518(3). Similarly, the alleged surveillance violated FISA for numerous reasons, including that the government first failed to obtain an order from the Foreign Intelligence Surveillance Court by demonstrating probable cause to believe that "the target of the electronic surveillance is a foreign power of an agent of a foreign power." 50 U.S.C. § 1805(a)(2). The government has not argued – because it cannot – that the alleged unlawful warrantless surveillance complied with either Title III or FISA.

The government ignores completely the fact that when FISA was enacted, Title III was also amended to make clear that Title III and FISA taken together, provided "the exclusive means by which electronic surveillance . . . may be conducted." 18 U.S.C. § 2511(2)(f).[2] To the extent that the surveillance at issue here violated FISA – which the government must concede – it also necessarily violated Title III. Therefore, despite the government's arguments to the contrary, the alleged surveillance clearly violated

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Under Seal #10 happily would provide copies of these documents to the Court upon entry of an appropriate sealing order.

[2] Citation is made to the relevant version of 2511(2)(f) in existence at the time of the alleged unlawful wiretapping. It was subsequently amended.

the "laws of the United States" and thus was an "unlawful act" that the government was required to affirm or deny pursuant to Section 3504. *See* 18 U.S.C. § 3504(b).

The government also argues that because evidence obtained in violation of FISA is admissible at the grand jury stage, any such surveillance need not be disclosed pursuant to Section 3504. Not only is there no support for this argument which is created out of whole cloth, but it would render Section 3504 largely meaningless at the grand jury stage.

The government relies on two provisions of FISA, 50 U.S.C. 1806(c) and (e), neither of which supports its argument. Section U.S.C. 1806(c), entitled "Notification by United States," addresses under what circumstances the government is required to give notice to an individual prior to using evidence against that individual obtained pursuant to FISA. It does not address, directly or indirectly, whether evidence obtained in violation of FISA is admissible before a grand jury, or whether the government is required to admit or deny whether it violated FISA upon a claim being made by an aggrieved party pursuant to Section 3504. Similarly, Section 1806(e), entitled "Motion to Suppress," addresses when and how an aggrieved person may make a motion to suppress evidence obtained in violation of FISA. This section is simply irrelevant to the question before the Court.[3]

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[3] Title III contains a provision virtually identical to Section 1806(e) of FISA. 18 U.S.C. § 2518(10)(a) authorizes "(a)ny aggrieved person" in specified types of proceedings to "move to suppress the contents of any intercepted wire or oral communication, . . . or evidence derived therefrom." Section 2518(10)(a), like Section 1806(e) of FISA, does not explicitly authorize motions to suppress before a grand jury. In *Gelbard*

In short, there is no authority for the government's argument that evidence obtained in violation of FISA is admissible at the grand jury stage, and therefore violations of FISA need not be admitted or denied pursuant to section 3504 at the grand jury stage. *Accord In re: Grand Jury Proceedings of the Special April 2002 Grand Jury*, 347 F.3d 197, 205-06 (7th Cir. 2003) ("Because the surveillance was conducted lawfully here, there is no need to rule on the viability of a *Gelbard* defense in the FISA context. We reserve that issue for another day.")

The government also argues that the response it provided to Under Seal #10 stating that Under Seal #10 was "not a subject of electronic surveillance pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2522" satisfied its obligations under Section 3504. Gvt. Br. at 7-8. However, the government's letter response fails to address Under Seal #10's actual request, which was that the government disclose *any* illegal electronic surveillance, not just surveillance conducted "pursuant" or "subject" to Title III.[4]

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the government argued that the omission of grand jury proceedings from the suppression provision foreclosed a grand jury witness from raising a "good cause" defense to a contempt proceeding. The Court flatly rejected that argument. *See Gelbard v. United States*, 408 U.S. 41 at 59 (1972). For the same reasons, section 1806(e) provides no support for the government's argument that evidence obtained in violation of FISA is admissible before the grand jury, and therefore cannot support a *Gelbard* good cause defense at the grand jury stage.

[4] A copy of Under Seal #10's letter was included in the Fourth Circuit Joint Appendix at JA 92. The relevant portion of the transcript of the contempt hearing (discussed below) was included at JA 766. Both documents are maintained with both the district court and the Fourth Circuit under seal. Under Seal

Further, as detailed in the Petition for Certiorari and above, pursuant to Section 3054, the government was required to admit or deny whether it conducted unlawful surveillance of Under Seal #10 pursuant to former President Bush's warrantless surveillance program. But the letter response relied upon by the government did not admit or deny whether such surveillance existed because the government concedes that its the author, Special Assistant U.S. Attorney Steven Ward, did not know whether Under Seal #10 had been surveilled illegally. At oral argument on the government's motion to hold Under Seal #10 in contempt, the Assistant United States Attorney arguing the motion, Gordon Kromberg, admitted that the NSA program was a "secret program" and that he and Mr. Ward "don't know anything about it." Mr. Ward could not possibly have admitted or denied whether Under Seal #10 had been or was being illegally surveilled as he was required to by Section 3504.[5]

* * *

The government asks this Court to find, for the first time, that not only is evidence obtained in violation of Title III – so long as it also violates FISA – admissible in a grand jury proceeding, but also that the government does not have to admit or deny the existence of such unlawful surveillance

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#10 will happily provide the Court a copy of these documents upon entry of an appropriate sealing order.

[5] Given this admission on the record, the government's position that their letter stating that Under Seal #10 was "not a subject of electronic surveillance pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2522" is a denial of unlawful surveillance under the warrantless surveillance program is frivolous.

pursuant to Section 3504. Such a finding would be an unwarranted expansion of the law that would limit the statute to such an extent as to render it virtually meaningless in the grand jury context. The result urged by the government would conflict with the plain meaning of Section 3504, this Court's precedent in *Gelbard* and precedent from other circuit courts of appeal interpreting and applying *Gelbard*.

This Court should intervene so that the "well settled" protections afforded a grand jury witness by Congress in Section 3504 and by this Court in *Gelbard* are left to stand and those aggrieved will not "be crippled in their attempts to demonstrate that their communications have been unlawfully intercepted and § 3504 will serve no purpose." 597 F.3d at 211-212 (Traxler, J., dissenting.)

Respectfully submitted,

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